IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

WA.No. 400 of 2000(E)

AGAINST THE JUDGEMENT IN OP.15015/1999 Dated 10/01/2000
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APPELLANT: PETITIONER

K.V.AMEER,
KADAVILAVALAPIL HOUSE,
AYILAKADU P.O.,
EDAOOAK, MALAPPURAM.

BY ADV. SRI.KMV.PANDALAI

RESPONDENTS: RESPONDENTS
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1. THE ASSISTANT COMMISSIONER (ASSESSMENT),
SALES TAX OFFICE, SPECIAL CIRCLE, TIRUR.

2. THE DEPUTY COMMISSIONER, AIT & ST, PALAKKAD.

3. THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM (FORMERLY BOARD OF REVENUE),
THIRUVANANTHAPURAM.

4. THE DISTRICT COLLECTOR, MALAPPURAM.

5. THE TAHSILDAR, PONNANI.

BY GOVERNMENT PLEADER

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L. DATTU, C.J. & K.T. SANKARAN, J.

W.A.No.400 of 2000

Dated, this the 3rd day of July, 2007

JUDGMENT

H.L. DATTU, CJ.

The assessee is a dealer registered both under the provisions of the Kerala General Sales Tax Act (the Act for short) and the Central Sales Tax Act (CST Act for short).

2. For the assessment years 1989-90 and 1990-91 he had filed his annual returns as required under the Act as well as under the Kerala General Sales Tax Rules (the Rules for short) framed thereunder. In accordance with the returns so filed, he had paid taxes due under the Act.

3. The assessing authority did not accept the returns so filed by the assessee. Therefore, after rejecting the returns so filed, it had directed the assessee to produce the books of accounts, ledgers etc. by issuing a pre-assessment notice. Pursuant to the said notice, the assessee had produced the books of accounts maintained by him during the regular course of his business.

4. The assessing authority, taking note of the entries made in the books of accounts, has come to the conclusion that the assessee while filing his annual returns had not shown the true and complete total and taxable turnover in the returns filed by him. Having come to that conclusion, he has not only completed the best judgment assessment for

the aforesaid assessment years, but also had levied penal interest under section 23(3) of the Act.

5. The assessee in his attempt to get the order modified/rectified/annulled, had filed appeals as provided under the Act and also the original petition before this court. He was unsuccessful throughout. That is how he is before us in this writ appeal.

6. Learned counsel appearing for the appellant would submit that for levy of penal interest under section 23(3) of the Act, if there is any tax or any other amount assessed or due under the Act is not paid by any dealer within the time prescribed, the dealer shall pay by way of interest in the manner prescribed under the Act. According to the learned counsel for the assessee, depending on the entries in the books of accounts, the assessing authority could not have invoked his powers under section 23(3) of the Act to levy penal interest. In support of his contention the learned counsel has brought to our notice the observations made by the Apex Court in the case of ***Maruti Wire Industries Pvt. Ltd. v. Sales Tax Officer, First Circle, Mattancherry - [2001] 122 STC 410***. In the said decision the Apex Court after analysing subsection (3) of section 23 of the Act has stated as under:

> "3. The present one is not a case where any amount of tax was collected by the appellant and then not deposited. It is an admitted position that the validity of impugned demand depends on the meaning to be

assigned to the expression “if the tax or any other amount assessed” as occurring in section 23(3) of the Act. According to the appellant there was no order of assessment nor a return of turnover filed by way of self-assessment in which case it should have been accompanied by proof of payment of tax as per self-assessment and, therefore, the appellant was not required to pay tax unless and until a demand based on an order of assessment was raised against it. According to the respondent, an assessee held liable to payment of sales tax and not filing a return of turnover, cannot be placed on a higher pedestal than an assessee who files a return and, therefore, a reasonable construction to be placed on sub-section (3) of section 23 would be that an assessee not filing a return of turnover should be held liable to pay penal interest with effect from a date on which he should have filed a return of turnover accompanied by payment of tax even if such return was not actually filed. The learned counsel for the appellant submitted in response that the scheme of the Act as it stood at the relevant time contemplates a different penal action against such default, i.e., penalty under section 45A of the Act for failure to submit the return of turnover which penalty can be as high as an amount twice the amount of sales tax payable but liability to pay penal interest cannot be cast on the assessee for such failure when the Act does not specifically provide for levy of penal interest for failure to file return of turnover. We find merit in the appellant's plea. A legislative *casus omissus* cannot be supplied by judicial

interpretative process."

7. Per contra the learned counsel appearing for the Revenue would submit that the assessee is required to file his returns as required under sub-rule (7) of Rule 21 of the Rules and since the assessee had failed to pay the tax due under the self-assessment, the assessing authority was justified in levying penal interest by invoking his powers under sub-section (3) of section 23 of the Act. In aid of his submission the learned counsel has brought to our notice the Full Bench decision of this Court in the case of ***Abdullah v. Sales Tax Officer - 1992 (1) KLT 658.*** That was a case where the issue before the court was whether service of notice of demand is essential for the purpose of levy and collection of penal interest specified in section 23(3) of the Act. While answering the issue the court was of the opinion that service of notice of demand is not essential for the purpose of levy and collection of penal interest specified in section 23(3) of the Act. The said decision was rendered in the context, where an assessee had filed his returns declaring his total and taxable turnover, but had failed to pay tax. The question before the court was whether penal interest requires to be calculated after service of notice of demand as required under Rule 14 of the Rules or is it depends on the self-assessment that is filed by the assessee before the assessing authority.

8. The factual situation in the present case is wholly different.

Therefore the observations made by the Full Bench of this Court in ***Abdullah's*** case (supra) may not come to the aid of the learned Government Pleader appearing for the Revenue.

9. We repeat the factual situation in the instant case to give an answer to the issues raised in this writ appeal. The assessee for the assessment years 1989-90 and 1990-91 had filed his returns by declaring the total and taxable turnover. He had also enclosed a chalan for having paid the tax due under the Act. The returns so filed is not accepted by the assessing authority. Therefore it had called upon the assessee to produce the books of accounts maintained in the regular course of his business. The assessee had produced those books before the assessing authority. After verifying the books of accounts and the entries made therein, the assessing authority was of the opinion that the returns so filed by the assessee are not in consonance with the entries made in the books of accounts. Therefore it has proceeded to levy interest under section 23 (3) of the Act.

10. The language employed under section 23(3) of the Act and the decision of the Apex Court explaining the said provision, in our opinion, would negative the thinking and conclusion reached by the assessing authority, the first appellate authority, the Tribunal as well as by this court. In that view of the matter, the relief sought for by the appellant in this appeal requires to be granted.

11. Accordingly, the following:

Order

i. The writ appeal is allowed.

ii. The orders passed by the learned Single Judge in O.P.No.15015 of 1999 dated 10.1.2000 is set aside.

iii. Further, the demand for payment of penal interest for the assessment years 1989-90 and 1990-91 is quashed.

12. In view of the order passed in the Writ Appeal, C.M.P. No.1052 of 2000 is dismissed.

Ordered accordingly.

H.L. DATTU,
CHIEF JUSTICE.

K.T. SANKARAN,
JUDGE.

mt/DK.